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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

Nos. 3 and 4.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

ANDREW J. AIKENS,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

ALBERT HUEGIN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON REHEARING.

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The briefs of counsel for plaintiffs in error have taken a wide range. A large part of the argument is devoted to a discussion of the principle that under our institutions of government, the individual is free to enter into contract or business relations with his fellows, or not, as he pleases. This entire branch of the argument is well summed up in *Cooley on Torts*, as quoted on page 41 in one of the briefs, as follows:

"It is a part of every man's civil rights that he be left at "liberty to refuse business relations with any person whomso- "ever, whether the refusal rests upon reason or is the result of "whim, caprice, prejudice or malice."

This proposition, as stated by the author, relates of course to individual and independent action, and thus limited, we have no disposition to dispute it.

Another large part of the argument is devoted to the proposition that an act otherwise legal, is not made illegal because of the motive from which it is done; and that an act which would be lawful if done without malice, is not made unlawful because of a malicious intent. If an extensive consideration or discussion of the authorities for and against this proposition should be regarded by the Court as assistful in the determination of the question to be decided in this case, we refer to the very elaborate note upon this subject, to the case of *Passaic Print Works vs. Ely & Walker Dry Goods Co.*, as reported in 62 L. R. A., at page 673, in which the authorities, both *pro* and *con*, are exhaustively reviewed. The conclusion is stated as follows:

"It is believed that the weight of modern judicial opinion "sustains the following propositions:

"A person who suffers damage from an act the commission "of which does him no legal injury, can not maintain an action "against him who does it with malice and bad motive.

"If one does an act which he has a perfect legal right to do, "to accomplish some real benefit or pleasure to himself, or "others in whom he has a genuine interest, and for doing which "in good faith no action would lie, he is not rendered liable "to an action therefor by the fact that he did it from bad "motive and with intent to injure another, and such injury "results.

"But if one, with the sole and malicious purpose of injuring "another, and without any benefit, interest or pleasure (other "than that he derives from his wicked intent) to himself or "others, commit an act which, if done in good faith, would be "justifiable, he is liable in an action in favor of such other "person for the damages he may have sustained therefrom.

"The foregoing cases exhibit the diversity of judgment "upon the subject under consideration. The trouble has "chiefly arisen from a failure of the different Courts in which "the question has been discussed and variously adjudicated to "come to an agreement as to what is 'justifiable cause.' Chief "Justice Field, in *Vegelahn vs. Guenther*, 167 Mass., 92; 35 L. R. "A., 722; 44 N. E., 1077, at p. 102, states what is "undoubtedly true in saying: 'What constitutes justifiable "cause remains in some respects undetermined.' It would

"seem, however, that the tendency of modern decision is to-
"wards declaring illegal and actionable any act committed
"solely out of bad motive, or what has been aptly termed
"'unmixed malice' without justifiable cause, and which ma-
"terially injures, or is reasonably likely to injure, the person
"or feelings, or the business or occupation—in other words,
"the property rights—of another; and, as held in *State ex rel.*
"*Durner vs. Huegin* (approved and followed in *Hawardin vs.*
"*Youghiogheny & L. Coal Co.*, 111 Wis., 545; 55 L. R. A., 828; 87
"N. W., 472), and also *Boutwell vs. Marr*, 71 Vt., 1; 43 L. R. A.,
"803; 42 Atl., 607; *Carew vs. Rutherford*, 106 Mass., 1; 8 Am.
"Rep., 287, and *Delz vs. Winfree*, 80 Tex., 400; 16 S. W., 111,
"that such malicious act, committed under circum-
"stances which would not be actionable if done by an in-
"dividual, may become so if done by a combination or con-
"spiracy of several; and that such tendency has been brought
"about largely by the changed state of affairs in society and
"business relations, due, to a considerable extent, at least, to
"the great increase of labor organizations, and, correspond-
"ingly, to trusts, syndicates, and other combinations or associ-
"ations of employers, and to consequently numerous cases
"arising out of the differences between employer and em-
"ployee, labor and capital. It must be admitted, however, that
"this has not been brought about without a struggle on the
"part of not a few Courts and judges to maintain the doctrine
"that an act that will not subject an individual to a civil
"action can not be made the foundation of a cause of action
"against several who combine to commit the same. *Bohn Mfg.*
"*Co. vs. Hollis*, 54 Minn., 223, sub mon. *Bohn Mfg. Co. vs. North-*
"*western Lumbermen's Asso.*, 21 L. R. A., 337; 55 S. W., 1119;
"*Hunt vs. Simonds*, 19 Mo., 583,—*supra*, IV. a; *Orr vs. Home Mut.*
"*Ins. Co.*, 12 La. Ann., 255; 68 Am. Dec., 770, *supra*, IV. b;
"*Brewster vs. C. Miller's Sons Co.*, 101 Ky., 368; 38 L. R. A., 505;
"41 S. W., 301." (p. 727.)

As this discussion relates wholly to a right of civil action independent of statute, whichever way it may be resolved, we do not regard it as decisive or even relevant to the question at issue in this case,—which, as we understand it, is as to the power of the legislature to prohibit combinations which have for their purpose the malicious injury of trade. It is undoubtedly true, that if combinations of the character described in the statute as construed by the State Court, were illegal at common law and would give rise to a right of action in favor of one damaged thereby, it follows that it was within the

power of the legislature to prohibit them; for we think it would hardly be contended that the constitution of the United States confers upon any person or combination of persons a vested right to commit an act which was illegal at the common law. It does not follow, however, that if such combinations were not illegal at common law, the legislature has not the power to declare them illegal. We submit, therefore, that the entire argument of counsel for plaintiffs in error upon this branch of the case, with reference to the matter in issue before this Court, is a *non sequitur*.

The precise question presented for determination, we think, is correctly stated in the brief of counsel for plaintiffs in error, Huegin and Aikens, on page 5, as follows:

"Does Sec. 4466a, Stats. 1898, as interpreted and applied by "the Wisconsin Supreme Court, deprive the accused of their "liberty or property, or deny to them the equal protection of "the law, in violation of Section 1 of the 14th Amendment to "the Constitution of the United States."

The statute referred to is as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the pur- "pose of wilfully or maliciously injuring another in his reputa- "tion, trade, business or profession by any means whatever, or "for the purpose of maliciously compelling another to do or "perform any act against his will, or preventing or hindering "another from doing or performing any lawful act, shall be "punished by imprisonment in the county jail not more than "one year or by fine not exceeding five hundred dollars."

We think the question before the Court may be further narrowed by eliminating the alternative offense described in the statute beginning with the words: "or for the purpose of maliciously compelling another to do or perform any act against his will," etc., as not affecting the accused and not calling for the conideration of the Court at this time.

The complaint under which the plaintiffs in error were arrested and convicted, charged them with a conspiracy to maliciously injure the business of another, an offense comprehended solely under that part of the statute which reads:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the pur-

"pose of wilfully or maliciously injuring another in his repu-
"tation, trade, business or profession, by any means whatever
"* * * shall be punished by imprisonment in the county
"jail not more than one year or by fine not exceeding five
"hundred dollars."

The plaintiffs are not affected by the rest of the statute, and therefore can not complain of it.

Waters-Pierce Oil Co. vs. Texas, 177 U. S., 28, at page 43.
Clark vs. Kansas City, 176 U. S., 114.
Tellis vs. Lake Erie Railway, 175 U. S., 348.

Assuming, as we do, that plaintiffs in error can have no proper concern with the alternative part of the statute, which was separable and distinct and was in no wise applied to them, we will confine our attention entirely to the portion of the statute last quoted and under which they were accused and convicted.

I.

It seems strange that any constitutional question should ever have arisen under a statute thus limited by its terms to the interdiction of combinations of persons organized for the purpose of inflicting a wilful or malicious injury upon the business or reputation of another.

But we do not understand that plaintiffs in error complain of the terms of the statute, so much as of its interpretation by the Court. An examination of the briefs we think will show, however, that it was not so much of the interpretation of the statute of which they complain, as of the interpretation given by the Court to their acts and conduct, bringing them within the terms of the statute,—that is to say, the arguments of counsel are directed against the application of the statute to the specific case of the plaintiffs, rather than against the statute itself.

We desire in this connection to suggest that the question before this Court, as we understand it, is not as to the correctness of the judgment of the State Court in judging of the character of the combination, or the quality of the acts and

conduct of plaintiffs in error, as to whether or not they come within the terms of the statute, but whether or not the statute is constitutional according to its terms and the interpretation placed thereon by the State Court. For it is submitted that if the statute as declared by the legislature and the courts as to the class of combinations to which it was intended to apply, is constitutional, it is not made unconstitutional, because improperly applied to a specific case. The rule in this respect is clearly laid down in *Arrowsmith vs. Harmoning*, 118 U. S., 194, as follows:

"When the legislature of a state enacts laws for the gov-
"ernment of its courts while exercising their respective juris-
"dictions, which, if followed, will furnish parties the necessary
"constitutional protection of life, liberty and property, it has
"performed its constitutional duty; and if one of its courts,
"acting within its jurisdiction, makes an erroneous decision
"in this respect, the state can not be deemed guilty of violat-
"ing the constitutional provision that no state shall deprive a
"person of life, liberty or property without due process of
"law."

The general application and authority of this rule is recognized in *In re Storti*, 109 Fed. Rep., 807, 809, as follows:

"Beginning with the case of *Arrowsmith vs. Harmoning*, 118
"U. S., 194, and following down through a long line of cases and
"also through a line of parallel cases raising the same ques-
"tion, but in different form, it is held that the 14th amend-
"ment does not apply where the legislature has done its duty
"and where the fault is either with the courts or with the
"officials."

For illustration,—a statute against murder, properly describing the elements of that offense, would not be rendered unconstitutional if the courts, in a particular case, recognizing the true meaning of the statute, should erroneously apply it to a case of justifiable homicide. It would hardly be contended that such erroneous application would make the statute unconstitutional.

We respectfully submit, as we think may be clearly demonstrated, that the statute was correctly and properly applied to the case at bar; but whatever fault, if any, there may have been in its application, the interpretation of the statute by the Court was well within its terms, and is not

open to question on constitutional grounds.

As indicated in our former brief filed herein, the statute was construed by the Supreme Court of the State on habeas corpus proceedings based on the alleged insufficiency of the complaint on which plaintiffs in error were arrested.

State ex rel. Durner vs. Huegin et al., 110 Wis., 89.
(Record 6.)

The Court was called upon in that case to construe the statute with reference to its meaning, scope and general application, and also to construe the acts of the plaintiffs in error charged in the complaint, to ascertain if they were amenable to the statute. We will undertake to give as near as may be, in the language of the Court, the interpretation of the statute *and of the acts of the plaintiffs in error in contradistinction.* In the syllabus of the case, prepared by Mr. Justice Marshall, who wrote the opinion, summarizing the decision of the Court, it is said:

"A complaint stating that three persons, naming them, "concerted together, using substantially the language of the "statute, for the purpose of maliciously injuring another in "his business, describes the conspiracy made criminal by Sec. "4466a, Statutes of 1898.

"An agreement between several independent concerns, "each publishing a newspaper and furnishing thereby means "for advertising, to compel a fourth person engaged in like "business to reduce his rates for advertising or lose customers, "indicates a malicious purpose to injure the business of the "latter within the meaning of Sec. 4466a, Statutes of 1898.

"If Sec. 4466a be regarded as describing a conspiracy be-"tween owners of independent enterprises to control the rates "charged in their line of work in any locality, great or small, "it is not constitutional. *However, it can not be so regarded, for it "makes the malicious purpose to injure an essential.*

"Several persons, conducting independent business enter-"prises, may, in the absence of a statute, combine to control "prices for the purpose of promoting their individual interests, "and in their operations to that end impoverish a rival and "drive him out of business, there being no malicious intent in "their conduct, using the term in the sense of malice in law. "Sec. 4466a does not go that far.

"All agreements to maliciously injure another in any way "are contrary to the policy of the law. Legislative authority

"is ample to outlaw such agreements to the extent of making "the participants therein liable civilly and criminally.

* * * * * * *

"A combination of persons to injure another without any "just cause, *such as an injury that is not an incidental effect* of the "promotion of the legitimate interests of the members of the "combine, is a conspiracy to inflict a malicious injury upon "another at common law, and is such an injury under the "statute (Sec. 4466a, Stats. 1898) if it relates to another's "reputation, business, trade or profession.

* * * * * * *

"The term 'malicious injury' as used in the statute, is syn- "onymous with that term in the law of conspiracy independent "of the statute.

"Sec. 4466a, Stats. 1898, is a mere declaration of the com- "mon law. Its only effect is, as to the particular matters "stated therein, to remove the necessity for an overt act, "which is required by the change in the common law by Sec. "4568."

In the opinion, expressly defining the scope, meaning and limitations of the statute, it was said:

"Frequent recurrence to the fundamental principles of "actionable conspiracy is essential to keep from ingrafting "upon a judicial system something which is entirely new, to "meet the desires of those who arrogate to themselves the "right, not only to monopolize trade or effort in some particu- "lar field, but, under the guise of fair trade, to control or de- "stroy the business of competitors without any expectation of "profit to themselves,—to wrongfully harm such competitors "merely because they insist upon individual right to conduct "individual business in one's own way. A combination with "the malicious purpose indicated is an actionable wrong. "Had it not been for Sec. 4568, Stats. 1898, adding to the com- "mon law essentials of an indictable conspiracy the necessity "for an overt act, Sec. 4466a would have been unnecessary to "enable the Court to punish, criminally, such wrongs. That "is a mere declaration of the common law. It operates as a "repeal, by inplication, of Sec. 4568 so far as otherwise a "specific overt act would be required to render a malicious "conspiracy to injure the trade, business, reputation or profes- "sion of another, an offense. The old doctrine, with its "ancient meaning, should be referred to in construing Sec. "4466a. An actionable conspiracy is a combination of two or "more persons for the purpose of accomplishing a criminal "or unlawful object by criminal or unlawful means. One may, "through purely malicious motives, attract to himself an- "other's customers and the injury be so slight in contempla-

"tion of law that *De minimis non curat lex* applies; but when "he unites others with him to maliciously injure the business "of another for the mere gratification, in whole or in part, of "a desire to inflict such injury, the condition of there being "the combined force of many directed towards another, char- "acterized by the element of malice, renders the act of com- "bining for the particular purpose unlawful and a substantive "offense, in the absence of a statute requiring some additional "element.

* * * * * * *

"Our conclusion is this: the term 'malicious injury' as used "in the statute, is synonymous with that term at the common "law; it refers to the infliction of a wrongful injury intention- "ally; such a wrong is actionable even though the same pur- "pose, if formed and executed by an individual, would not, in "contemplation of the law, be considered sufficiently serious "to call successfully for legal redress. There is nothing in "this militating at all against the right of individuals to com- "bine and associate together for the purpose of promoting "their individual welfare in any legitimate way. It strikes "only at the assertion of a right of combining to resort to the "use, as a single power, of the individual abilities and re- "sources of two or more to wrongfully accomplish harm to "another in the line of those things mentioned in the statute." (Pages 262, 263.)

With reference to the facts of the case,—the specific acts with which plaintiffs in error were charged, the Court said:

"At this time it seems necessary to re-state the charge "contained in the complaint as we have construed it. Upon "that turn the remaining questions to be considered.

"According to the complaint it was in substance agreed "between the defendants in error Melvin A. Hoyt, represent- "ing The Daily News; Albert Huegin, representing The Mil- "waukee Sentinel, and Andrew J. Aikens, representing The "Evening Wisconsin,—each controlling the columns of the "paper with which he was connected, each paper being a daily "newspaper published in the city of Milwaukee and a medium "for advertising business in the same field occupied by The "Journal Company, the publisher of a newspaper called The "Milwaukee Journal, also a medium for advertising business, "—that whereas the latter had raised its charges twenty-five "per cent. above those customarily charged for such service "by it and the proprietors of the other papers named, if any "person agreed to pay or paid the Journal Company its in- "creased rates for advertising in its paper, he should not have "the privilege of advertising in any of the other newspapers "unless he should advertise in all of them at such increased

"rates; but that any person who should decline to pay The "Journal Company said increased rates for advertising in its "paper, should have the privilege of advertising in any or all "of the other papers at the old rate. Now, it is said there is "nothing in that from which a reasonable inference of the "malicious purposes called for by the statute can arise; that "such intent means bad intent to injure another in the sense "of committing an actionable injury, while the terms of the "agreement indicate only a purpose on the part of those con- "cerned in it to promote their own interests regardless of "those of their competitor. The malice of the statute is evi- "dently malice in law, not necessarily ill-will or malice in "fact. It means, as is commonly said, a wrongful act done "intentionally without just cause or excuse. The statute does "not deal with things corporeal, as the person or property of "another, but with his reputation, trade, business or profes- "sion. If we can see in the agreement, by reasonable infer- "ence, the *independent* purpose to harm The Journal Com- "pany in its business of furnishing to the trade facilities for "advertising, that is sufficient as regards the element of malice. "There seems to be no difficulty about that. The principle "that every one is presumed to intend the natural and prob- "able consequences of his voluntary acts suggests at once, "upon looking at the agreement, that the primary, if not the "sole, end in view was to force The Journal Company to re- "duce its advertising rates to the old standard or cause it to "lose custom, either of which alternatives would result in "pecuniary loss to it and one of them in the destruction of the "freedom of action every one is entitled to enjoy in the conduct "of his business, without turning any pecuniary or other legi- "timate gain to its competitors. If the agreement contem- "plated that any legitimate benefit, under the circumstances, "would flow to the participants therein or the concerns they "represented, by compelling The Journal Company to reduce "its rates for advertising, the ground for it is not disclosed by "the transaction as stated, and it is one of those mysteries of "a special calling that persons outside thereof can not com- "prehend. How could any material benefit have been ex- "pected by any member of the combine, from causing a cus- "tomer or customers of The Journal Company to leave it "rather than be denied the use of any other efficient news- "paper medium for advertising in the field occupied by the "four competitors?"

It thus appears it was expressly held that to bring plaintiffs in error within the statute, it must appear that the purpose of the combination, with which they were charged, was to inflict a malicious injury upon the business of The Journal

Company, in the sense in which the term "malicious injury" was understood at the common law; and the Court has, we conceive, correctly defined the term "malicious injury" as used at common law, to be an act resulting in damage, intentionally done for the purpose of causing harm or loss to another, without legal justification or excuse. That a combination organized with such purpose was indictable as a conspiracy at the common law, is, we believe, not open to controversy. The Court concluded, as matter of fact—as indicated in the opinion that the only fair inference from the nature of the combination as it was disclosed in the complaint, was that it was formed for the purpose of malicious injury;—that is to say, for the purpose of causing loss or damage to The Journal Company without reference to any incidental advantage or benefit to the parties to the combination, and without any reasonable expectation of any such advantage or benefit. The Court did not hold, as seems to be understood by counsel for plaintiffs in error, that fair or legitimate business competition, if such had been shown to be the purpose of the combination, might not have been a justification, but held distinctly that the combination as disclosed by the complaint, could not by any legitimate inference be considered an act of legitimate competition, for the reason that it had no apparent tendency to advance the business interests of the parties to the combination. Counsel for plaintiffs in error earnestly insist that in this conclusion the Court was in error, and undertake to show, by various lines of reasoning, how the parties to the combination might have been benefited. We assume that this Court will not undertake to decide between counsel and the State Court, upon this difference of opinion with reference to the motives of the combination in question. Even if it were conceded (which it is not) an error of judgment was committed by the State Court as to the quality of the defendants' acts by virtue of which they were brought within the terms of the statute, we submit that for the purpose of this case, this Court must accept the construction placed upon the statute by the State Court, which was in effect that its meaning and intent is to prohibit a combina-

tion formed for the purpose of maliciously injuring the business of another, using the term "malicious injury" in the sense of the common law; and must also accept the construction placed by the Court upon the acts with which plaintiffs in error were charged, which was that they plainly evinced a purpose to wantonly and maliciously injure the business of The Journal Company, without reference to their own profit or advantage in business,—in other words, without the justification or excuse of legitimate competition.

It is contended that the effect of this decision, which was rendered on the sufficiency of the complaint as indicated, was modified by the subsequent judgment of the Supreme Court confirming the judgment of conviction in the Court below. A brief reference to the record, we think, will show that such is not the case.

Following the decision of the Supreme Court sustaining the complaint, an information was filed following precisely the language of the complaint. The defendant Hoyt interposed a demurrer (Record 14). This was overruled and he elected to stand upon his demurrer. The defendants Huegin and Aikens each interposed a special plea, in the nature of a confession and an attempted avoidance. The confession admitted the combination and agreement and the acts charged in pursuance thereof, as alleged in the information, and also that the intent thereof was to injure The Journal Company. In attempted avoidance it was pleaded,

"That these acts, intentions, agreements and combinations "were done, harbored, made and entered into in trade compe- "tition, and that such acts, intentions, agreements and com- "binations, and none other, constituted the alleged unlawful "conspiracy in said information mentioned."

By standing upon his demurrer, the defendant Hoyt of course admitted the charges of the information. The other defendants, by confessing the combination and that its purpose was to injure the Journal Company, admitted in effect that it was for no other purpose—*Expressio unius alterius exclusio est*,—that is to say, by the express confession that the purpose of the combination was to injure the Journal Com-

pany, every other purpose not expressly declared is excluded.

The State Supreme Court, as indicated in its opinion on the former appeal, was unable to see anything in the nature of the combination as disclosed in the complaint and subsequently in the information, but a wanton and malicious purpose to injure a business rival. Now, as it is entirely conceivable that a purely malicious injury may be inspired by trade competition, or even done in the course thereof, the general allegation that the combination was formed and the acts done in trade competition, is entirely consistent with the confession that its sole purpose was to injure the Journal. It was certainly consistent with the hypothesis that such was its primary purpose.

While it may be difficult to define in a general statement the limit of incidental damage to others to which trade competition may be carried, we submit that to make it legitimate, the expected benefit should always be the primary or ultimate object, with the purpose to injure or destroy, if present at all, incidental or subordinate.

The defendants were fully advised by the opinion of the Court, passing upon the sufficiency of the complaint, that *prima facie* and without explanation, the combination disclosed in the complaint could not be regarded as an act of legitimate business competition. No explanation to rebut such inference was offered in the pleadings of the defendants to the information; and the demurrers of the state to the pleas were sustained. The defendants refused to plead over and judgment went accordingly. The judgments were confirmed by the Supreme Court, strictly on the ground of *res judicata*.

It can not be doubted that had the defendants interposed proper pleas to the information, to put in issue the charge of an intent to inflict a malicious injury, which was not only expressly charged in the information, but which the Supreme Court held was fairly inferable from the facts stated, an issue of fact would have been raised upon which they would have been entitled to the verdict of a jury.

It is respectfully submitted that the broad claim of trade competition, unexplained by any specifications of fact upon which it was based, with no denial of the malicious purpose and intent expressly charged in the information, was utterly insufficient as an avoidance of the matter confessed. Trade competition is a very elastic term, and can not be made a justification for everything that may be done in its name. We believe it is recorded that crimes have been committed in the name of religion itself. All trade competition is not legitimate;—some of it is fair, and some grossly unfair and unjustifiable. The question, we submit, so far as trade competition might have been been available as a defense, was not whether the combination was inspired by trade competition, *but whether or not it was a legitimate act of trade competition.*

II.

As argued above, we do not think the test of the constitutionality of the law in question is whether or not the legislature might prohibit combinations of the specific character as that with which the plaintiffs in error were charged; but even if this test be applied to the case, the result is the same.

It is argued that the application of the statute by the State Court to the specific case of plaintiffs in error makes it unconstitutional because it interferes with the liberty of contract guaranteed to citizens by the federal constitution.

BUT THE LIBERTY OF CONTRACT FOR WHICH THEY CONTEND IS THE LIBERTY OF COMPETITORS IN BUSINESS TO ENTER INTO AGREEMENTS AND COMBINATIONS BETWEEN THEMSELVES, FOR THE PURPOSE OF SO REGULATING AND CONTROLLING PRICES AS TO CRIPPLE OR DESTROY OTHER COMPETITORS.

This, as we understand, is what is claimed was in fact the purpose of the combination. Accepting these premises for the sake of argument, it is manifest that the tendency of the combination was to restrict the freedom of contract and competition between the parties to the combination and to foster a monopoly of the advertising business by destroying a competitor.

If, for illustration, an advertiser who happened to be a patron of the Journal Company should apply to the Sentinel, the newspaper controlled by Huegin, for an advertisement, that paper, by the terms of the combination agreement was not free to deal with him upon a competitive basis as regards the other two parties to the combination, but was obliged to refuse his advertisement unless he should consent to either withdraw his advertisement from the Journal Company and refuse to advertise with it at its established rates, or else advertise not only with the Sentinel but with the other two papers to the combination as well, at an arbitrary and increased rate. It is not evident that one of the direct tendencies of the combination was to stifle competition between the parties thereto? By the terms of the combination, an advertiser who wished to advertise in the Journal and also in one of the other papers to the combination, was compelled not only to pay to that party to the combination in whose paper he wished to advertise, an arbitrary and very much higher price, but was also compelled to advertise in the other two papers at the same arbitrary rate.

The manifest tendency of the combination in this respect was to establish for the newspapers which were parties to it, an arbitrary and non-competitive rate for advertising, which was regulated and fixed by the combination, and incidentally to destroy the competition of the Journal Company. The combination therefore had a direct tendency to stifle competition and foster a monopoly.

Whether such a combination might lawfully have been entered into under the common law or not, it is well settled that the legislature of the state has ample power to prohibit it. A case very much in point is *State vs. Firemen's Fund Ins. Co.* (Mo. Sup. Ct.), 45 L. R. A., 363. In that case it was held that:

"An unlawful combination of insurers in violation of Mis-
"souri act 1897, prohibiting any pool or combination to regu-
"late prices or the premium to be paid for insurance, is made
"by insurance companies, each of which buys and furnishes
"to its agent the rate book and correction slips prepared by a
"certain person, while the agents form what is called an

"'Underwriter's Social Club,' to the secretary of which, who "is an inexperienced young man and not an insurance expert, "each local agent submits his daily report in an unsealed "envelope, addressed to his company, that the secretary may "see that the agent does not write policies at less than the "rates agreed."

It was further held that:

"The constitutional guaranty of the right to life, liberty "and property, does not include the right of insurers to con- "tract among themselves for the maintenance of rates."

In the opinion the Court said:

"It is claimed that Section 30 of Art. 2 of the Constitution "of Missouri provides that 'no person shall be deprived of life, "liberty or property without due process of law,'; and that "this act violates that provision, because it 'renders it unlaw- "ful for defendants to contract or agree among themselves, "or with the agents of other insurance companies, or for their "agents to contract and agree among themselves, for the rea- "sonable adjustment and maintenance of rates of premium to "be charged for insurance against fire, lightning, or storm in "this state.' This is a total misapprehension of the act. It "does not prohibit any company or the agents of any company, "from contracting with any person who desires to insure his "property upon any terms they two may agree upon. This is "the extent and true meaning of the right to contract. It "does prohibit any company, by itself or through its agent, "contracting with any other company or its agents not to con- "tract with the insured except upon terms which such insur- "ance companies or their agents have previously established. "In other words, it protects the company against the tempta- "tions of a trust or monopoly by refusing to permit it to strip "itself of the power to freely contract, for under the arrange- "ment shown, in this case, the applicant for insurance is free "to contract, but the company and its agent has already "limited and qualified its power by previous contract with "another company or its agent. The law has made this pro- "vision more out of regard for the otherwise helpless insurer "than from tender consideration for the insurance company, "but it incidentally preserves what it is here claimed it "denies,—the free, unrestrained power to contract by both "parties to it. Such laws have not only been adjudged consti- "tutional by the Supreme Court of the United States (*U. S. vs. "Trans-Missouri Freight Asso.*, 166 U. S., 290; *U. S. vs. Joint "Traffic Asso.*, 171 U. S., 558), and by the United States Court "of Appeals, *U. S. vs. Addyston Pipe & S. Co.*, 54 U. S. App., 723- "777; 85 Fed. Rep., 271; 29 C. C. A., 141, but the principles they

"announce have been expressly sanctioned by the Supreme "Courts of New York (*People vs. Sheldon*, 139 N. Y., 251; 23 L. "R. A., 221); of Pennsylvania (*Morris Run Coal Co. vs. Barclay "Coal Co.*, 68 Pa., 173; 8 Am. Rep., 159); of Ohio (*Central Ohio "Salt Co. vs. Guthrie*, 35 Ohio St., 666); of Kentucky (*Anderson "vs. Jett*, 89 Ky., 375; 6 L. R. A., 390); of Iowa (*Chapin vs. Brown*, "83 Iowa, 156; 12 L. R. A., 428); of Illinois (*Craft vs. McConoughy*, 79 Ill., 346; 22 Am. Rep., 171; *More vs. Bennett*, 140 Ill., "69; 15 L. R. A., 361); of Wisconsin (*Milwaukee Masons & B. "Asso. vs. Niezorawski*, 95 Wis., 129; 37 L. R. A., 127); of California (*Vulcan Powder Co. vs. Hercules Powder Co.*, 96 Cal., 510); "of Texas (*Texas Standard Oil Co. vs. Adoue*, 83 Tex., 650; 15 "L. R. A., 595), and of Louisiana (*India Bagging Asso. vs. Kock*, "14 La. Ann., 164). There is no more merit in this contention "than there would be that a law was unconstitutional which "prohibited two or more persons from conspiring to commit "murder, or burglary, or any other felony. There is no such "thing in civilized society, as the unrestrained power to contract. Every man surrenders some of his individual rights "when he associates with or becomes a part of any society or "government, and the power of the government is complete to "legislate so that, while according to every man the fullest "possible liberty to do what he pleases with his own, he must "not interfere with the similar right of others. This principle "underlies and runs through all governments and societies, "and is the cornerstone of the police power of the state."

Any association or combination of persons organized for the purpose of regulating prices is an unlawful combination.

Central Ohio Salt Co. vs. Guthrie, 35 Ohio St., 666.

Emery vs. Ohio Candle Co., 47 Ohio St., 320, 24 N. E., 660.

Distilling & Cattle Feeding Co. vs. People ex rel. Moloney, 156 Ill., 488, 41 N. E., 188.

Jackson vs. Akron Brick Asso., 53 Ohio St., 303, 35 L. R. A., 287, 41 N. E., 257.

Bishop vs. American Preservers' Co., 157 Ill., 284, 41 N. E., 765.

Santa Clara Valley Mill & Lumber Co. vs. Hayes, 76 Cal., 387, 18 Pac., 391.

Vulcan Powder Co. vs. Hercules Powder Co., 96 Cal., 510, 31 Pac., 581.

Arnot vs. Pitson & E. Coal Co., 68 N. Y., 558, 23 Am. Rep., 100.

Morris Run Coal Co. vs. Barclay Coal Co., 68 Pa., 173, 8 Am. Rep., 159.

India Bagging Asso. vs. Kock, 83 Iowa, 297, 12 L. R. A., 428, 48 N. W., 1074.

People vs. Milk Exchange, 145 N. Y., 267, 27 L. R. A., 437, 39 N. E., 1062.

Ford vs. Chicago Milk Shippers Asso., 155 Ill., 166, 27 L. A. R., 298, 39 N. E., 651.

Pacific Factor Co. vs. Adler, 90 Cal., 110, 27 Pac., 36.

Judd vs. Harrington, 139 N. Y., 105, 34 N. E., 790.

De Witt Wire-Cloth Co. vs. New Jersey Wire-Cloth Co., 16 Daly, 529, 14 N. Y. Supp., 277.

John D. Park & Sons Co. vs. National Wholesale Druggists Asso., 50 N. Y. Supp., 1064.

Merz Capsule Co. vs. United States Capsule Co., 67 Fed., 414.

Cravens vs. Carter Crume Co., 34 C. C. A., 479, 92 Fed., 479.

It is not material whether the price is increased, or whether it is reduced, or whether the price fixed is a reasonable one or an unreasonable one.

U. S. vs. Trans-Missouri Freight Asso., 166 U. S., 290, 41 L. ed., 1007, 17 Sup. Ct. Rep., 540.

U. S. vs. Joint Traffic Asso., 171 U. S., 505, 43 L. ed., 259, 19 Sup. Ct. Rep., 25.

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211, 44 L. ed.. 136, 20 Sup. Ct. Rep., 96.

Harding vs. American Glucose Co., 182 Ill., 551, 55 N. E., 577.

National Harrow Co. vs. Bement, 21 App. Div., 290, 47 N. Y. Supp., 462.

Richardson vs. Buhl, 77 Mich., 632, 6 L. R. A., 457, 43 N. W., 1102.

State ex rel. Watson vs. Standard Oil Co., 49 Ohio St., 137, 15 L. R. A., 516, 30 N. E., 279.

People vs. Milk Exchange, 145 N. Y., 267, 27 L. R. A., 437, 39 N. E., 1062.

Nor is it necessary that the purpose should be to establish a complete monopoly.

United States vs. E. C. Knight Co., 156 U. S., 1, 39 L. ed., 325, 15 Sup. Ct. Rep., 249.

Addyston Pipe & S. Co. vs. United States, 175 U. S., 211, 44 L. ed., 136, 20 Sup. Ct. Rep., 96.

Texas Standard Oil Co. vs. Adoue, 83 Tex., 650, 15 L. R. A., 598, 19 S. W., 274, 279.

By Art. 5 of the Amendments to the Constitution of the United States, the federal government is prohibited from depriving any person of life, liberty or property, without due process of law. This prohibition upon the federal government is precisely the same in terms as the prohibition upon the states by the 14th amendment under which it is claimed the liberty of plaintiffs in error has been violated. So it must be admitted that the power of the state to pass laws restricting or prohibiting combinations tending to the injury of trade and commerce within the state is at least as broad as the powers of Congress with reference to inter-state trade. The numerous decisions of the federal courts, therefore, arising under the so-called anti-trust law, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," with reference to the power of Congress to pass such statutes, are therefore strictly in point on the question of the power of the state to enact the statute under consideration.

One of the latest expressions of this Court upon the subject of the powers of Congress to enact such laws, is the case of *Northern Securities Co. vs. The United States*, the decision of which was handed down at the October, 1903, term of the Court. In that case the Court, after citing the numerous cases arising upon various phases of the law in which its constitutionality was invariably upheld, said:

"We will not encumber this opinion by extended extracts "from the former opinions of this Court. It is sufficient to "say that from the decisions in the above cases certain propo- "sitions are plainly deducible and embrace the present case. "These propositions are:

"That although the act of Congress known as the anti-"trust act has no reference to the mere manufacture or pro-"duction of articles or commodities within the limits of the "several states, it does embrace and declare to be illegal every "contract, combination, or conspiracy, in whatever form, of "whatever nature, and whoever may be parties to it, which "directly or necessarily operates in restraint of trade or com-"merce among the several states or with foreign nations;

"That the act is not limited to restraints of interstate and "international trade or commerce that are unreasonable in "their nature, but embraces all direct restraints imposed by "any combination, conspiracy, or monopoly upon such trade or "commerce;

"That railroad carriers engaged in interstate or interna-"tional trade or commerce are embraced by the act;

"That combinations, even among private manufacturers or "dealers, whereby interstate or international commerce is "restrained, are equally embraced by this act;

"That Congress has the power to establish rules by which "interstate and international commerce shall be governed, "and by the anti-trust act, has prescribed the rule of free "competition among those engaged in such commerce;

"That every combination or conspiracy which would extin-"guish competition between otherwise competing railroads "engaged in interstate trade or commerce, and which would "in that way restrain such trade or commerce, is made illegal "by the act;

"That the natural effect of competition is to increase com-"merce and an agreement whose direct effect is to prevent this "play of competition restrains instead of promoting trade and "commerce;

"That to vitiate a combination such as the act of Congress "condemns, it need not be shown that the combination, in fact, "results or will result, in a total suppression of trade or in a "complete monopoly, but it is only essential to show that, by "its necessary operation, it tends to restrain interstate or "international trade or commerce or tends to create a mon-"opoly in such trade or commerce and to deprive the public "of the advantages that flow from free competition;

"That the constitutional guaranty of liberty of contract "does not prevent Congress from prescribing the rule of free "competition, for those engaged in interstate and interna-"tional commerce; and

"That under its power to regulate commerce among the "several states and with foreign nations, Congress has author-"ity to enact the statute in question.

"No one, we assume, will deny that these propositions were "distinctly announced in the former decisions of this Court.

"They can not be ignored or their effect avoided by the intima-
"tion that the Court indulged in *obiter dicta*."

And it was said further:

"The means employed in respect of the combinations for-
"bidden by the anti-trust act, and which Congress deemed
"germane to the end to be accomplished, was to prescribe as a
"rule for interstate and international commerce (not for
"domestic commerce) that it should not be vexed by combina-
"tions, conspiracies, or monopolies which restrain commerce
"by destroying or restricting competition. We say that
"Congress has prescribed such a rule, because, in all the prior
"cases in this Court, the anti-trust act has been construed as
"forbidding any combination which, by its necessary opera-
"tion, destroys or restricts free competition among those en-
"gaged in interstate commerce; in other words, that to de-
"stroy or restrict free competition in interstate commerce was
"to restrain such commerce. Now, can this Court say that
"such a rule is prohibited by the Constitution or is not one
"that Congress could appropriately prescribe when exerting
"its power under the commerce clause of the Constitution?
"Whether the free operation of the normal laws of competi-
"tion is a wise and wholesome rule for trade and commerce
"is an economic question which this Court need not consider
"or determine. Undoubtedly, there are those who think that
"the general business interests and prosperity of the country
"will be best promoted if the rule of competition is not ap-
"plied. But there are others who believe that such a rule is
"more necessary in these days of enormous wealth than it
"ever was in any former period of our history. Be all this as
"it may, Congress has, in effect, recognized the rule of free
"competition by declaring illegal every combination or con-
"spiracy in restraint of interstate and international com-
"merce. As, in the judgment of Congress, the public con-
"venience and the general welfare will be best subserved when
"the natural laws of competition are left undisturbed, by
"those engaged in interstate commerce, and as Congress has
"embodied that rule in a statute, that must be, for all, the end
"of the matter, if this is to remain a government of laws, and
"not of men."

And further, quoting with approval from *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa., 173, 186, it was said:

" 'When competition is left free, individual error or folly
" 'will generally find a correction in the conduct of others.
" 'But here is a combination of all the companies operating in
" 'the Blossburg and Barclay mining regions, and controlling
" 'their entire productions. * * * In all such combina-

" 'tions where the purpose is injurious or unlawful, the gist of
" 'the offense is the conspiracy. Men can often do by the
" 'combination of many what, severally, no one could accom-
" 'plish, and even what, when done by one, would be innocent.
" '* * * There is a potency in numbers when combined
" 'which the law can not overlook, where injury is the con-
" 'sequence.' "

And further:

"The same principles were applied in *Arnot vs. Pittson & E.
"Coal Co.*, 68 N. Y., 558; 23 Am. Rep., 190, 194, which was the
"case of a combination of two coal companies in order to give
"one of them a monopoly of coal in a particular region, the
"Court of Appeals of New York holding that 'a combination to
"effect such a purpose is inimical to the interests of the public,
"and that all contracts designed to effect such an end are con-
"trary to public policy, and therefore illegal.' They were also
"applied by the Supreme Court of Ohio in *Central Ohio Salt
"Co. vs. Guthrie*, 35 Ohio State, 666, 672, which was the case of
"a combination among manufacturers of salt in a large salt-
"producing territory, the Court saying: 'It is no answer to
"say that competition in the salt trade was not in fact de-
"stroyed, or that the price of the commodity was not unreason-
"ably advanced. Courts will not stop to inquire as to the
"degree of injury inflicted upon the public; it is enough to
"know that the inevitable tendency of such contracts is in-
"jurious to the public.'

"So, in *Craft vs. McConoughy*, 79 Ill., 346, 350; 22 Am. Rep.,
"171, 174, which was the case of a combination among grain
"dealers by which competition was stifled, the Court saying:
" 'So long as competition was free, the interest of the public
"was safe. The laws of trade in connection with the rigor of
"competition, was all the guaranty the public required; but
"the secret combination created by the contract destroyed all
"competition, and created a monopoly against which the pub-
"lic interest had no protection.' Again, in *People ex rel. Pea-
"body vs. Chicago Gas Trust Co.*, 130 Ill., 269, 297; 8 L. R. A.,
"497, 506; 22 N. E., 798, 804, which involved the validity of the
"organization of a gas corporation which obtained a monopoly
"in the business of furnishing illuminating gas in the city of
"Chicago by buying the stock of four other gas companies, it
"was said: 'Of what avail is it that any number of gas com-
"panies, may be formed under the general incorporation law,
"if a giant trust company can be clothed with the power of
"buying up and holding stock and property of such companies,
"and, through the control thereby attained, can direct all
"their operations and weld them into one huge combination?'
"To the same effect are cases almost too numerous to be cited.

"But among those we refer to *Richardson vs. Buhl*, 77 Mich., "632; 6 L. R. A., 457; 43 N. W., 1102, which was the case of the "organization of a corporation in Connecticut to unite in one "corporation all the match manufacturers in the United "States, and thus to obtain control of the business of manufac- "turing matches, *Santa Clara Valley Mill & Lumber Co. vs. "Hayes*, 76 Cal., 387, 390; 18 Pac., 391, which was the case of a "combination among manufacturers of lumber, by which it "could control the business in certain localities; and *India "Bagging Asso. vs. Kock*, 14 La. Ann., 164, which was the case of "a combination among various commercial firms to control the "prices of bagging used by cotton planters. THE CASES "JUST CITED, IT IS TRUE, RELATE TO THE DOMESTIC "COMMERCE OF THE STATES. BUT THEY SERVE TO "SHOW THE AUTHORITY WHICH THE STATES POS- "SESS TO GUARD THE PUBLIC AGAINST COMBINA- "TIONS THAT REPRESS INDIVIDUAL ENTERPRISE "AND INTERFERE WITH THE OPERATION OF THE "NATURAL LAWS OF COMPETITION AMONG THOSE "ENGAGED IN TRADE WITHIN ITS LIMITS." (The capitals are ours.)

In *United States vs. Joint Traffic Association*, 171 U. S., 505, 571, the Court said:

"The cases cited by the respondents' counsel in regard to "the general constitutional right of the citizen to make con- "tracts relating to his lawful business are not inconsistent "with the existence of the power of Congress to prohibit con- "tracts of the nature involved in this case. The power to "regulate commerce has no limitation, other than those pre- "scribed in the Constitution. The power, however, does not "carry with it the right to destroy or impair those limitations "and guarantees which are also placed in the Constitution or "in any of the amendments to that instrument. *Monongahela "Navigation Co. vs. United States*, 148 U. S., 312, 336; *Interstate "Commerce Commission vs. Brimson*, 154 U. S., 447-479.

"Among these limitations and guarantees counsel refer to "those which provide that no person shall be deprived of life, "liberty or property without due process of law, and that "private property shall not be taken for public use without "just compensation. The latter limitation is, we think, plainly "irrelevant.

"As to the former, it is claimed that the citizen is deprived "of his liberty without due process of law when, by a general "statute, he is arbitrarily deprived of the right to make a con- "tract of the nature herein involved.

"The case of *Allgeyer vs. Louisiana*, 165 U. S., 578, is cited as "authority for the statement concerning the right to contract.

"In speaking of the meaning of the word 'liberty' as used in "the Fourteenth Amendment to the Constitution, it was said "in that case to include, among other things, the liberty of the "citizen to pursue any livelihood or vocation, and for that pur- "pose to enter into all contracts which might be proper, neces- "sary and essential to his carrying out those objects to a "successful conclusion.

"We do not impugn the correctness of that statement. "The citizen may have the right to make a proper (that is, a "lawful) contract, one which is also essential and necessary for "carrying out his lawful purposes. The question which arises "here is, whether the contract is a proper or lawful one, and "we have not advanced a step towards its solution by saying "that the citizen is protected by the Fifth, or any other amend- "ment, in his right to make proper contracts to enable him to "carry out his lawful purposes. We presume it will not be "contended that the Court meant in stating the right of the "citizen 'to pursue any livelihood or vocation to include "every means of obtaining a livelihood, whether it was lawful "or otherwise. Precisely how far a legislature can go in de- "claring a certain means of obtaining a livelihood unlawful, it "is unnecessary here to speak of. It will be conceded it has "power to make some kinds of vocations and some methods "of obtaining a livelihood unlawful, and in regard to those the "citizen would have no right to contract to carry them on.

"Congress may restrain individuals from making con- "tracts under certain circumstances and upon certain sub- "jects. *Frisbie vs. United States*, 157 U. S. 160.

"Notwithstanding the general liberty of contract which is "possessed by the citizen under the constitution, we find that "there are many kinds of contracts which, while not in them- "selves immoral or *mala in se*, may yet be prohibited by the "legislation of the states or, in certain cases, by Congress. "The question comes back whether the statute under review "is a legitimate exercise of the power of Congress over inter- "state commerce and a valid regulation thereof. The ques- "tion is, for us, one of power only, and not of policy. We "think the power exists in Congress, and that the statute is "therefore valid." (pp. 571-573)

The case of *Anderson vs. United States*, 171 U. S. 604, cited on behalf of plaintiffs in error in support of their contention, does not aid them. That case did not relate to the power of a state to suppress a combination tending to injure trade, but was decided solely on the ground that the combination there in question did not tend to restrain competition or

trade. The key-note of the decision, as found in the language of the Court on page 614, is as follows:

"It will be remembered that the association does no busi-"ness itself. Those who are members thereof compete among "themselves and with others who are not members, for the "purchase of the cattle while the association itself has noth-"ing to do with transportation nor with fixing the prices for "which cattle may be purchased or thereafter sold."

The same cannot be said of the combination in the case at bar. Here the combination did undertake to fix an arbitrary rate which all advertisers who patronized The Journal Company—who might, for anything that appears to the contrary, include all the advertisers in the city; and as to this large and indefinite class of advertisers, the parties to the combination did not compete among themselves, but it was one of the terms of the combination that any one of such class who advertised with one of the parties, must advertise with all and pay to all the same arbitrary increased rate.

It may be said that one tendency of this combination was to lower the price of advertising, by making The Journal Company reduce its rates. But it may also be said that its tendency was to raise the price of advertising by making advertisers of a class which might embrace every advertiser in the community, pay an increased rate in the three papers controlled by the parties to the combination. If the object was to force The Journal Company out of business, as counsel suggest it may have been, with this object accomplished the combination might readily extend their arbitrary rates to all advertisers.

In *People vs. Milk Exchange*, 145 N. Y. 267, which was an action brought by the attorney-general to vacate the charter of the Milk Exchange on the ground that it was an unlawful combination of the dealers in milk designed to stifle competition and control prices, the Court said:

"It may be claimed that the purpose of the combination "was to reduce the price of milk, and that it being an article "of food such reduction was not against public policy. But "the price was fixed for the benefit of the dealers, and not "the consumers, and the logical effect upon the trade of so "fixing the price by the combination was to paralyze the pro-

"duction and limit the supply, and thus leave the dealers in "a position to control the market, and at their option to "enhance the price to be paid by the consumers. This brings "the case within the condemnation of the authorities to which "we have referred." (p. 274)

And in the same case, quoting from *People vs. Sheldon*, the Court said:

"If agreements and combinations to prevent competition "in prices are or may be hurtful to trade, the only sure "remedy is to prohibit all agreements of that character. If "the validity of such an agreement was made to depend upon "actual proof of public prejudice or injury, it would be very "difficult in any case to establish the invalidity, although the "moral evidence might be very convincing."

In *Gibbs vs. McNeeley*, 118 Fed. Rep. 120, 60 L. A. R. 152, which was the case of a combination of shingle manufacturers, decided by the United States Circuit Court of Appeals for the Ninth Circuit, the Court said:

"There can be no doubt that at common law it is an unlaw- "ful combination in restraint of trade. It has the effect to "diminish production, abolish competition, and enhance "prices. Its illegality is not relieved by the fact that it was "induced by the keen competition and the unprofitable con- "dition of the shingle manufacturing business which existed "before it was entered into, or by the fact that the prices "fixed by the combination may have been reasonable. *Amer- "ican Biscuit & Mfg. Co. vs. Klotz*, 44 Fed. 721; *Richardson vs. "Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *State ex rel. "Watson vs. Standard Oil Co.* 49 Ohio State 137, 15 L. R. A. 145, "30 N. E. 279; *People vs. Milk Exchange*, 145 N. Y. 267, 27 L. R. "A. 437m 39 N. E. 1062; *National Harrow Co. vs. Hench*, 39 "L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36; "*Cravens vs. Carter-Crume Co.*, 34 C. A. A. 479, 92 Fed. 479."

For an exhaustive review of cases in the state and federal courts, condemning as illegal combinations tending to the control of prices and the restriction of competition, see the opinion of Judge Taft in *United States vs. Addyston Pipe & Steel Co.*, 54 U. S. App., 723; 85 Fed. Rep., 271; 46 L. R. A., 122, and the same case as decided by this Court and reported in 175 U. S., 211.

It is the fixed policy of practically every state in the Union, as evidenced by statutes to that end, to prohibit all

combinations of independent interests, the tendency of which is to restrict competition or encourage monopoly, to the injury of trade and commerce. A number of these statutes are stated by way of illustration at the conclusion of our former brief filed herein.

III.

THE ENACTMENT OF SUCH STATUTES AS THE ONE IN QUESTION, FALLS STRICTLY WITHIN THE BROAD SCOPE OF THE POLICE POWERS OF THE STATE.

"The police power of the state may be broadly defined as "that inherent and plenary power which enables it to interdict "that which is prejudicial to the welfare of society. It is "aptly termed 'the law of overruling necessity.'"

Noyes on Intercorporate Relations, Sec. 409.
Lake View vs. Rose Hill Cemetery Co., 70 Ill., 191.

It extends not only over matters relating to the health, morals and safety of the public, but over whatever relates to the public comfort and convenience.

Lake Shore, &c. Ry. vs. Ohio, 173 U. S., 285.

As stated in Cooley's Constitutional Limitations (4th Edition), 713:

"The police powers of the state, in a comprehensive sense, "embrace its whole system of internal regulations by which "the state seeks not only to preserve the public order and to "prevent offenses against the state, but also to establish, for "the intercourse of citizens with citizens, those rules of good "manners and good neighborhood which are calculated to "prevent the conflict of rights and to insure to each the unin- "terrupted enjoyment of his own, so far as reasonably con- "sistent with a like enjoyment of rights by others."

The state, in the exercise of its police power, may enact "all such laws not in plain conflict with some provision of the state or federal constitutions, as may rightfully be deemed necessary and expedient for the safetly, health, morals, comfort and welfare of the people."

Knoxville Iron Co. vs. Harbison, 183, U. S., 20.

"Laws against combinations for the purpose of restricting "production, maintaining prices or suppressing competition, "have a relation to the end of all police regulations,—the com- "fort, welfare or safety of society. The preservation of com- "petition is clearly within the police power of the state. In "the absence of statutory provisions, the law leaves combina- "tions inimical to public policy as it finds them, and contents "itself with declining to recognize or enforce them. Statutes "reinforcing the common law, defining the rules of public "policy, and making criminal illegal combinations, are, un- "doubtedly, valid.

"The power of police, however, is not confined to providing "additional penalties for forming combinations previously un- "lawful. Any statute, having for its object the preservation "of competition and prohibiting all agreements or combina- "tions, the direct effect of the operation of which may be the "restriction of competition, is undoubtedly constitutional, al- "though it goes much further than the common law. The "wisdom or policy of its provisions is a matter for legislative "determination."

Noyes on Intercorporate Relations, Sec. 409, quoting numerous authorities in support of the text.

The 14th Amendment does not conflict with the exercise of the state's police power.

Davis vs. Massachusetts, 167 U. S., 43.

Jones vs. Brin, 165 U. S., 180.

Covington, etc. Turnpike vs. Sandford, 164 U. S., 592.

As said by Mr. Justice Field, in *Barbier vs. Connolly*, 113 U. S., 27:

"Neither the amendment, broad and comprehensive as it is, "nor any other amendment, was designed to interfere with the "power of the state,—sometimes called its police power, to "prescribe regulations to promote the health, peace, morals, "education and good order of the people, *and to legislate so as "to increase the industries of the state, develop its resources and add "to its wealth and prosperity.*"

IV.

As argued above, it is not necessary, in order to uphold the validity of the statute, to demonstrate that combinations of

the character of the one in question, were illegal at common law; for the power of the legislature to prohibit combinations of this character in the interest of public policy, goes much further than the common law. But that such combinations were illegal at common law is established beyond question.

Olive vs. Van Patten, 7 Tex. Civ. App., 630, 25 S. W., 428.

Van Horn vs. Van Horn, 52 N. J. L., 284, 20 Atl., 485, 10 L. R. A., 184.

Jackson vs. Stanfield, 137 Ind., 592, 23 L. R. A., 588, 36 N. E., 345, 37 N. E., 14.

Old Dominion S. S. Co. vs. McKenna, 24 Blatchf., 244, 30 Fed., 48.

Casey vs. Cincinnati Typographical Union No. 3, 12 L. R. A., 193, 45 Fed., 135.

Toledo A. A. & N. M. R. Co. vs. Pennsylvania Co., 19 L. R. A., 387, 5 Inters. Com. Rep. 522, 54 Fed., 730.

Thomas vs. Cincinnati N. O. & T. P. R. Co., 4 Inters. Com. Rep., 788, 62 Fed., 803.

Hopkins vs. Oxley Stave Co., 28 C. C. A., 99, 49 U. S. App,, 709, 83 Fed., 912.

Walker vs. Cronin, 107 Mass., 55.

Barr vs. Trades Councils (N. J. Ch.), 30 Atl., Rep., 881.

Graham vs. St. Charles Street R'y Co., 47 La. Ann., 214, 27 L. R. A., 416.

Arthur vs. Oakes, 63 Fed. Rep., 323.

Ertz vs. Produce Exchange (Minn.), 81 N. W. Rep., 737.

Delz vs. Winfree, 80 Tex., 400.

Doremus vs. Hennessy, 176 Ill., 608, 43 L. R. A., 797.

Inter-Ocean Co. vs. Associated Press (Ill.), 56 N. E., 822.

Suppose, for illustration, one of the parties to the combination agreement should, in violation of the terms thereof, have accepted patrons of The Journal Company as advertisers at the old rates, and without requiring such patrons to advertise in the other two papers to the combination; will

it be contended that any cause of action would accrue against the party so violating the combination agreement in favor of the other parties thereto? Would not the Court, regardless of the statute, be compelled to say that the agreement was void and unenforceable because contrary to public policy? If the combination agreement could not be enforced as between the parties to the combination, because contrary to public policy, can it be contended that it was not within the power of the legislautre to prohibit such a combination?

V.

It is argued—apparently with great seriousness—that the effect of the statute as construed by the Court, is to prevent individual parties to the combination from saying upon what terms or conditions they will enter into business relations with others. Counsel, in their premises and particularly in their method of stating this proposition in its various forms, leave out of view the element of combination and of the express purpose to injure,—to say nothing of the natural tendency and effect of the combination to restrict competition and foster monopoly.

We have already shown that the freedom of contract guaranteed to the citizen by the 14th and 5th Amendments to the Constitution of the United States, does not interfere in the least with the power of the legislature—state or federal, as the case may be—to regulate or suppress combinations the tendency of which, regardless of their actual purpose, is to restrict competition or restrain trade.

That such was the nature of the combination in question as viewed by the state court is evident from the language of the decision upholding the validity of the statute as regards the power of the legislature to enact it. Thus, on page 252 of the decision (*State ex rel. Durner vs. Huegin*, 110 Wis.) the Court said:

"National and state legislatures have dealt with that sub-
"ject in many instances, in recent years, and uniformly with
"success so far as regards constitutional limitations,—with
"such success in fact that the man of learning must be recog-

"nized as one of courage who will attempt at this late day "to challenge legislative power in that regard on constitu- "tional grounds.

"The time seems past for that, as regards combinations of "individual independent interests, designed to remain inde- "pendent for most purposes, but to act in combination to con- "trol trade. By numerous decisions of the highest courts in "this country, the police power incident to sovereignty has "been held to be broad enough to permit the legislautre to "deal, by creating civil or criminal liability, or both, with all "combinations in restraint of trade which are void by com- "mon-law rules on grounds of public policy, and, within rea- "sonable limits to be set by courts in the light of constitu- "tional safe-guards, to say that things are contrary to public "policy not so before, to legislate against them, and to en- "force the legislative will by civil or criminal liability, or "both:—within the broad field indicated, to regulate or pro- "hibit any combination of the kind we are talking about, "formed for the purpose of restraining trade or disturbing "those natural business condtions, where every individual is "supposed to be free to contend with every other in the regu- "lar course of business. We are speaking here of independ- "ent interests concerting together for the purpose mentioned. "That must be kept in mind. These questions have been so "firmly settled that no court will now venture to do more "than follow what has been decided. Contracts that operate "merely in restraint of trade, such as is contended the one in "question was, even though unreasonable, were not action- "able at all at the common law. They were void, merely. The "courts would not enforce or give effect to them. But new "conditions have arisen creating new dangers, or intensifying "old ones that were once considered so trifling as to pass un- "noticed, calling for new restraints and new remedies. Who "can say that sovereign power has been so surrendered as to "be left incapable of dealing with that subject? Right or "wrong, those dangers have been considered so great, and "power to deal with them so ample, that legislation has gone "to the length we have indicated, making combinations to "stifle independent, individual competition, illegal and action- "able, civilly and criminally, all upon the broad ground that "legislative authority exists in the administration of the "police power, to regulate or prohibit those things which are "contrary to public policy by the rules of the common law; and "to go further and determine, in the light of new conditions, "what is detrimental to the public welfare, and to legislate "accordingly.

"On what has been said, the following of many authorities

"that might be cited are in point: *U. S. vs. Addyston P. & S.* "*Co.*, 85 Fed. Rep., 271; *U. S. vs. Trans-Missouri F. Asso.*, 166 "U. S., 290; *Gibbs vs. McNeeley*, 102 Fed. Rep., 594; *Nester vs.* "*Continental B. Co.*, 161 Pa. St., 473; *People vs. Sheldon*, 139 N. "Y., 251; *Jackson vs. Stanfield*, 137 Ind., 592; *People ex rel.* "*Morse vs. Nussbaum*, 32 Misc. (N. Y.), 1; *Leonard vs. Poole*, 114 "N. Y., 371; *People vs. Milk Exchange*, 145 N. Y., 267; *Ford vs.* "*Chicago M. S. Asso.*, 155 Ill., 166. The number of cases that "could be cited on this subject is so great that no attempt "has been made to do more than collect here a few that con- "tain pretty full discussions thereof. A study of them re- "veals the fact that the power of public opinion in favor of "preventing combinations to stifle individual freedom in bus- "iness and the sacrifice of those benefits, that are popularly "supposed to flow from free competition, has led to legisla- "tion in most of the states of the Union, as well as by the "Federal Congress, and that in but very few instances has "such an enactment met the bar of the constitution of "state or nation. A late work that treats of police powers, "sums up the subject here under discussion thus:

" 'It is believed that the constitutionality of none of the
" 'numerous anti-trust statutes has been successfully ques-
" 'tioned on the ground that they infringed the personal
" 'liberty of contract, in punishing civilly or criminally the
" 'entrance into a contract or combination in unreasonable re-
" 'straint of trade. That such contracts and combinations are
" 'void, independently of statute and at the common law—so
" 'far at least as to justify the courts in refusing to enforce
" 'them or in any other way to give the parties to them the aid
" 'of judicial process in protecting and enforcing the rights of
" 'parties, which grow out of such agreements,—has been too
" 'long the settled rule of law, to admit of any serious question
" 'now. And the power of the state to declare such contracts
" 'unlawful being conceded, it is completely within the discre-
" 'tion of the legislature to determine whether such unlawful
" 'contracts and combinations shall be simply ignored by the
" 'courts or the parties to them be subjected to criminal or
" 'civil liabilities.' *1 Tiedeman, State & Federal Control*, Sec. "112."

This aspect of the combination in question, as we have seen, leaves out of view entirely the actual purpose or intent of the combination, and deals only with its tendency and effect. And upon this ground alone the power of the legislature to prohibit such combinations, we submit, in view of the many decisions of this Court, is beyond question. But as previously indicated, the validity of the statute as construed by

the State Court, need not be rested alone on the ground that the combinations against which it is directed were void at common law because in restraint of trade and against public policy. Where the purpose to inflict malicious injury was present, such combinations besides being void as contracts, were made criminal by the common law. And as viewed by the State Court the combination in question besides being of a character to make it illegal and void at the common law possessed also the element of a malicious purpose to injure, which made it criminal. Thus, returning to the decision just quoted from, it was further said:

"Coming back to the question of whether the malicious in-"jury which the complaint charges against the defendants in "error is such an injury as the one named in the statute, it "seems that it makes little difference whether we view the "statute as merely declaratory of the common law or as in the "line of the numerous state statutes to which we have re-"ferred, condemning combinations in restraint of, or injurious "to, trade. It has the distinctive element of malice which "satisfies common law requirements of a malicious combina-"tion to injure, which is actionable for civil damages and "punishable as a criminal offense by common law rules, as we "shall see later."

State ex rel. Durner vs. Huegin, 110 Wis., pp. 254, 255.

And again:

"This Court has often held that an executed conspiracy to "inflict a malicious injury is actionable. * * * The great "weight of authority, almost all authority, is to the same "effect. We give a few citations: 1 Hawk. P. C., 446, Sec. 2; "*State vs. Stewart*, 59 Vt., 273; *Carew vs. Rutherford*, 106 Mass., "14; *Ertz vs. Produce Exchange*, 79 Minn., 140; *State vs. Bu-"chanan*, 5 Har. & J., 317; *Comm. vs. Waterman*, 122 Mass., 57; "*Farmers L. & T. Co. vs. N. P. R. Co.*, 60 Fed. Rep., 803; "*State vs. Norton*, 23 N. J. Law, 33; *State vs. Glidden*, 55 Conn., "46; *Sherry vs. Perkins*, 147 Mass., 212; *Smith vs. People*, 25 "Ill., 17; *Crump vs. Comm.*, 84 Va., 927; *Doremus vs. Hennessy*, "176 Ill., 608."

A very recent case is *Martell vs. White* (Mass.), decided March 1st, 1904, and reported in 69 N. E. Reporter, 1085, in which the Court discusses at considerable length the effect of the presence of a malicious purpose to injure, to render illegal

a combination which might otherwise be justifiable on the ground of competition.

In that case the granite manufacturers of a city formed an association, a by-law of which provided that any member having business transactions with any other manufacturer of the city not a member of the association in relation to granite should, for each such transaction, contribute to the association's expenses from $1 to $500; the amount to be determined by the association. By means of fines, from $10 to $100 on members for dealings with plaintiff, his business was ruined. Held, that though the association's object was competition, which is not illegal, the means—coercion by fines—were illegal, so that defendants were liable for the injury.

This case, it should be observed, did not involve the power of the legislature to prohibit or restrict combinations in restraint of competition, but merely the common law right of action for conspiracy. In that case also it was contended that the extra contributions to the association required of those members who might desire to deal with outsiders, as a condition of their membership in the association, was in effect a legitimate "differential" against such members desiring to deal with outsiders. The Court said:

"Acting under the by-laws, the association investigated "charges which were made against several of its members that "they had purchased granite from a party 'not a member' of "the association. The charges were proved, and, under the "section above quoted, it was voted that the offending parties " 'should respectively contribute to the funds of the associa- "tion' the sums named in the votes. These sums ranged from "$10 to $100. * * * The party 'not a member' was the "present plaintiff, and the members of the association knew it. "Most of the customers of the plaintiff were members of the "association, and, after these proceedings they declined to deal "with him. This action on their part was due to the course "of the association in compelling them to contribute as above "stated, and to their fear that a similar vote for contribution "would be passed, should they continue to trade with the "plaintiff. The jury might properly have found, also, that the "euphemistic expression 'shall contribute to the funds of the "association,' contained an idea which could be more tersely "and accurately expressed by the phrase 'shall pay a fine,' or "in other words, that the plain intent of the section was to

"provide for the imposition upon those who came within its "provisions of a penalty in the nature of a substantial fine. "The bill of exceptions recites that 'there was no evidence of "threats or intimidation practiced upon the plaintiff himself, "and the acts complained of were confined to the action of the "society upon its own members.' We understand this state- "ment to mean simply that the acts of the association con- "cerned only such of the plaintiff's customers as were mem- "bers, and that no pressure was brought to bear upon the "plaintiff, except such as fairly resulted from action upon his "customers. While it is true that the by-law was not directed "expressly against the plaintiff by name, still he belonged to "the class whose business it was intended to affect, and the "proceedings actually taken were based upon transactions "with him alone, and in that way were directed against his "business alone. It was the intention of the defendants to "withdraw his customers from him, if possible, by the imposi- "tion of fines upon them, with the knowledge that the result "would be a great loss to the plaintiff. The defendants must "be presumed to have intended the natural result of their acts. "Here, then, is a clear and deliberate interference with the "business of a person, with the intention of causing damage to "him, and ending in that result. The defendants combined "and conspired together to ruin the plaintiff in his business, "and they accomplished their purpose. In all this, have they "kept within lawful bounds? It is elemental that the unlaw- "fulness of a conspiracy may be found either in the end sought, "or the means to be used. If either is unlawful, within the "meaning of the term as applied to the subject, then the con- "spiracy is unlawful. It becomes necessary, therefore, to "examine into the nature of the conspiracy in this case, both "as to the object sought and the means used.

"The case presents one phase of a general subject which "gravely concerns the interests of the business world, and "which in recent years has demanded and received great con- "sideration in the courts and elsewhere. Much remains to be "done to clear the atmosphere, but some things, at least, ap- "pear to have been settled; and certainly at this stage of the "judicial inquiry it can not be necessary to enter upon a course "of reasoning or to cite authorities in support of the proposi- "tion that, while a person must submit to competition, he has "the right to be protected from malicious interference with "his business. The rule is well stated in *Walker vs. Cronin*, "107 Mass., 555, 564, in the following language: 'Everyone has "a right to enjoy the fruits and advantages of his own enter- "prise, industry, skill, and credit. He has no right to be pro- "tected against competition, but he has a right to be free from

"malicious and wanton interference, disturbance, or annoy-
"ance. If disturbance or loss come as a result of competition,
"or the exercise of like rights by others, it is *damnum absque*
"*injuria*, unless some superior right by contract or otherwise
"is interfered with. But if it comes from the merely wanton
"or malicious acts of others, without the justification of com-
"petition or the service of any interest or lawful purpose, it
"then stands upon a different footing.' In a case like this,
"where the injury is intentionally inflicted, the crucial ques-
"tion is whether there is justifiable cause for the act. If the
"injury be inflicted without just cause or excuse, then it is
"actionable. Bowen, L. J., in *Mogul Steamship Co. vs. McGregor*,
"23 Q. B. D., 598, 613; *Plant vs. Woods*, 176 Mass., 492; 57 N. E.,
"1011; 51 L. R. A., 339; 79 Am. St. Rep., 330. The justification
"must be as broad as the act, and must cover not only the
"motive and the purpose, or in other words, the object sought,
"but also the means used."

The entire decision is instructive, as indicative of the extent to which competition may be urged as a justification for injury to the business of others on general principles of trade and independently of statute.

The case of *Delz vs. Winfree*, 80 Tex. Sup. Ct., 400, 16 S. W., 111, relied upon by counsel for plaintiffs in error, it seems to us is squarely against their contention. In that case it appeared that the defendants, members of two different firms, engaged in buying live animals, thereafter to be slaughtered and sold as butcher's meat, did combine, confederate and conspire with each other and with a butcher, not to sell the petitioner, for cash, live animals or slaughtered meat for the prosecution of his business. That each of said firms subsequently refused to sell the petitioner live animals when offered their own price in money, which he—the petitioner—then offered to pay them. That by reason of such combination against the plaintiff, he was compelled to close up and discontinue his business.

It was held that the complaint stated a good cause of action against the defendants, for malicious injury to the business of the plaintiff. The Court said:

"A person has an absolute right to refuse to have busi-
"ness relations with any person whomsoever, whether the
"refusal is based upon reason or is the result of whim,

"caprice, prejudice or malice, and there is no law which "forces a man to part with his title to his property. THE "PRIVILEGE HERE ASSERTED MUST BE LIMITED, "HOWEVER, TO THE INDIVIDUAL ACTION OF THE "PARTY WHO ASSERTS THE RIGHT. IT IS NOT "EQUALLY TRUE THAT ONE PERSON MAY FROM "SUCH MOTIVES INFLUENCE ANOTHER PERSON TO "DO THE SAME THING." (The capitals are ours.)

Counsel for plaintiffs in error, Huegin and Aaikens, admit that the law as above set forth, is correct. (Brief on Re-Argument, p. 68.)

We do not understand how they can successfully stand upon this proposition. It is clear that by the combination each of the parties thereto intended to induce and did induce the others not to have dealings with any of the customers of The Journal except upon conditions which were practically prohibitive of such customers continuing their relations with The Journal if it was necessary—as is alleged in the complaint—for them to advertise in two or more papers. We contend that the undertaking of each of the parties to the combination, not to have any dealings with anyone who should persist in advertising in The Journal, except at the rates fixed by the combination, was intended to be and was in fact, an inducement to the other parties to the combination to do the same thing. By the agreement the Sentinel induced the News and the Wisconsin to refrain from dealing with advertisers who patronized the Journal; the News did the same thing with reference to the Wisconsin and the Sentinel, and the Wisconsin did the same thing with reference to the Sentinel and the News. Therefore, if we apply the test laid down in *Delz vs. Winfree*, accepted by counsel as satisfactory, to the combination in the case at bar, it must be held illegal, independent of the statute.

VI.

It is also contended that any construction of the statute which would make it applicable to the combination in question, would make an ordinary partnership or joint business venture illegal.

As partnerships and every joint business undertaking which deserves to be encouraged by law, have for their primary object the benefit and advantage of the parties and not the injury of others, it is quite clear that they do not come either within the terms of the statute or within the definition thereof as given by the Supreme Court of Wisconsin.

As far as the statute as construed by the Court can be said to go in restraint of co-operation in business, is that where independent interests designing to remain independent for most purposes, combine for the purpose of controlling prices and stifling competition, and moreover for the specific purpose of injuring the business of another, such combinations are illegal. The distinction between the legitimate co-operation of labor or capital for the mutual benefit of the parties, and a combination between independent interests to stifle competition, control prices and destroy specific competitors, however much it may be confused by ingenious argument, as a practical question is not ordinarily difficult to determine. The claim that statutes of this character, condemning combinations in restraint of competition and trade, can not be enforced without destroying all partnership and co-operative business enterprise, is a well-worn contention, and one which we believe has been made in nearly every case of this kind.

The policy of the common law, which is the basis of all such statutes, is thus stated by Taft, Circuit Judge, in *United States vs. Addyston Pipe & Steel Co.*, 54 U. S. App., 723; 46 L. R. A., 122, at page 129 of the latter report:

"The inhibition against restraints of trade at common law "seems at first to have had no exceptions. See language of "Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a "time it became apparent to the people and the courts that it "was in the interest of trade that certain covenants in re- "straint of trade should be enforced. It was of importance, "as an incentive to industry and honest dealing in trade that, "after a man had built up a business with an extensive good- "will he should be able to sell his business and good-will to "the best advantage, and he could not do so unless he could "bind himself by an enforceable contract not to engage in the

"same business in such a way as to prevent injury to that "which he was about to sell. It was equally for the good of "the public and trade, when partners dissolved, and one took "the business, or they divided the business, that each partner "might bind himself not to do anything in trade thereafter "which would derogate from his grant of the interest con-"veyed to his former partner. Again, when two men became "partners in a business, although their union might reduce "competition, this effect was only an incident to the main pur-"pose of a union of their capital, enterprise and energy to "carry on a successful business, and one useful to the com-"munity. Restrictions in the articles of partnership upon the "business activity of the members, with a view of securing "their entire effort in the common enterprise, were, of course, "only ancillary to the main end of the union, and were to be "encouraged."

It is sufficient to say that the statute has not yet been applied to the case of a partnership or any legitimate co-operative business enterprise, and unless the construction which has thus far been placed upon it be radically changed, it is safe to say that it cannot be so applied. This Court doubtless will not undertake to anticipate an erroneous or mistaken application of the statute by declaring it unconstitutional in advance of such application.

It is the disposition of courts to uphold, rather than destroy, statutes.

To quote the head notes in a recent case,—*State vs. Smiley* (Supreme Court of Kansas), 69 Pacific Reporter, 199:

"The general language of statutes will be limited to "such persons and subjects as it is reasonable to presume the "legislature intended it should apply.

"Objections to the constitutional validity of statutes can "be made only by those to whom the enactment applies and "against whom attempts to enforce it are made."

VII.

It is also claimed with some apparent seriousness, that the statute is unconstitutional because it denies to plaintiffs in error the equal protection of the law guaranteed by the 14th amendment to the Constitution of the United States. As the statute is general in its terms and is made to apply to all

alike who come within its provisions, we are unable to perceive any force whatever in this contention.

In conclusion, we submit that the statute is moderate in its terms and well within the unquestionable scope of the police powers of the state; that its construction by the Supreme Court of the state in its application to the case of plaintiffs in error was conservative, and limited, rather than extended, the general terms of the statute. And finally, that the case of plaintiffs in error in the manner in which it came before the Court was well within the statute as construed by the Court, and that the judgment should be confirmed.

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